

### **REMARKS**

In the Final Office Action, claims 1-4, 6-15, 17-21, and 25 were rejected under 35 U.S.C. 102; claims 5 and 16 were rejected under 35 U.S.C. 103; and claims 26-27 were rejected under 35 U.S.C. 102 and, in the alternative, 35 U.S.C. 103.

#### **I. Claim Amendments**

Claims 1-3, 5-21, and 25-27 are pending in the application.

With this Amendment, claims 1, 9, 11, 12, 14, 15, 18-20, 25, and 27 are amended and new claims 28-32 are added. No new matter has been added.

Amended claim 1 is supported by the application as originally filed. For support for the storage stability feature, see, for example, paragraphs 28, 30, and 98-100.

Amended claims 9 is supported by the application as originally filed. See, for example, claim 20 as filed.

Amended claims 11, 12, 14, 15, and 18-20 have been amended to depend from a different base claim.

Amended claim 25 is supported by the application as originally filed.

Amended claim 27 and new claim 30 are supported by the application as originally filed. For support for the use of virgin bottle grade polyester, see, for example, claim 20 as filed.

New claims 28, 29, and 32 are supported by the application as originally filed. See, for example, claim 16 as filed.

New claim 31 directed to a method for forming a monolayer plastic container is supported by the application as originally filed. See, for example, paragraph 28 of US 2005/0181155 – hereinafter referred to as the “Published Application.”

#### **II. 35 U.S.C. 102**

Amended independent claim 1 recites a method for forming a plastic container, wherein the resulting plastic container is stable during unfilled storage and has an oxygen-scavenging property that is activated *after* filling the container with an aqueous

fluid. Unlike plastic containers of the present invention, conventional oxygen-scavenging plastic containers require costly fabrication and/or storage techniques to prevent oxygen-scavenging properties of the containers from being consumed before use.

Claims 1-3, 6-15, 17-21, and 25-27 stand rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 5,758,653 ("Collette"), which teaches a method for forming a multilayer plastic container that includes an oxygen scavenging layer. Contrary to the assertions of the Final Office Action, Collette teaches that the oxygen scavenger layer is purposefully activated *before* the plastic container is filled with product (see, e.g., C6L51-54; Summary at P4S2; C7L17-28; Summary at P5S4; C8L57-62) – perhaps through the addition of water such as might be introduced via the masterbatch (which may have a moisture content above 2,500 ppm – see C5L27-28) and/or via the post consumer polyethylene terephthalate ("PC-PET"). The PC-PET is included "in an amount effective to accelerate activation of the oxygen scavenger" (see, e.g., Summary at P2S1 and claim 1). This accelerated activation is presumably desired to avoid the costly aging processes required to achieve activation for certain conventional oxygen barrier systems, which are detailed in the Background Section (see, e.g., C2L13-21).

Because the Collette oxygen scavenger layer is already activated before filling, steps must be taken to avoid depletion of the activated scavenging layer prior to use. These steps include:

- (i) extending the shelf life of the activated preform and unfilled plastic container by refrigeration, desiccation, and/or storage under a modified atmosphere environment such as nitrogen (see C7L17-28); and/or
- (ii) shielding the activated oxygen scavenging layer between layers of ethylene vinyl alcohol ("EVOH") or MXD-6 nylon (see, e.g., Summary at P5 and C8L45-C9L9).

Thus, Collette does not teach or suggest a method, as recited in claim 1, which results in formation of a plastic container that includes an oxygen-scavenger barrier layer that (a) is stable during unfilled storage and (b) has an oxygen-scavenging property that is activated *after* the container is filled with an aqueous fluid. Instead, Collette teaches a

multilayer plastic container having an oxygen scavenging layer that is activated *before* filling, which necessitates the use of costly storage techniques and/or shielding layers to prevent the depletion of the oxygen scavenging capacity prior to filling.

Applicants respectfully submit that the Final Office Action mischaracterizes the teachings of Collette with respect to activation. None of the Collette passages cited in the Final Office Action, when read in proper context, teach or suggest a method for producing a plastic container that has a barrier layer with an oxygen scavenging property that is activated *after* filling. A discussion of these passages and their proper interpretation is provided below.

The section entitled "Activation of the Oxygen Scavenger" appearing at col. 6, line 43 through col. 7, line 33 of Collette is referenced in the Final Office Action as teaching activation after filling. When read as a whole, however, this section teaches the exact opposite (i.e., activation *before* filling). Activation before filling is clearly taught in Col. 6 lines 50-55, which functions as a roadmap for the entire section. Col. 6 lines 50-55 reads as follows:

"Prior to activation, the focus will mainly be on keeping the product from becoming activated. After activation, the focus is on filling the package while the package still retains a high percentage of its oxygen scavenging power."

Consistent with the first sentence of the above passage, col. 6, line 55 through col. 7, line 16 teaches methods for inhibiting or delaying activation of the oxygen scavenger material prior to formation of the preform (e.g., at the individual ingredient and masterbatch stages). Consistent with the second sentence of the above passage, col. 7 lines 17-28 teaches methods for extending the shelf life of the *activated* preform and unfilled plastic container by refrigeration, desiccation, and/or storage under a modified atmosphere environment.

The Final Office Action at pages 2 and 9 also cites col. 8 lines 46-51 of Collette as teaching activation after filling. This passage, however, also refers to an embodiment of Collette that teaches activation *before* filling. In this embodiment, an intermediate EVOH oxygen shielding layer is positioned between

the inner surface of the plastic container and a core oxygen-scavenging layer. When the plastic container is filled with product, the oxygen barrier properties of the EVOH layer decreases as the relative humidity of the EVOH layer increases. This decrease in the oxygen barrier properties of the EVOH layer allows oxygen entrapped within the container to permeate through the EVOH layer and reach the *already activated* oxygen-scavenging layer (see, e.g., Summary at P5 and C8L57-C9L9).

Thus, for the foregoing reasons, Collette does not disclose every element of amended claim 1 and does not constitute an anticipatory reference. Applicants respectfully submit that independent claim 1, and claims 2-3, 6-15, 17-21, and 25-26 which depend therefrom, are accordingly in condition for allowance. Reconsideration and notice to this effect is respectfully requested.

Independent claim 27 also stands rejected as being anticipated by Collette. As amended, claim 27 recites a method for producing a plastic container having a barrier layer that is formed from an admixture that consists essentially of a preblend and a virgin bottle grade base polyester. Collette does not teach a barrier layer formed from such an admixture. Rather, as discussed above, Collette teaches including PC-PET (i.e., *non-virgin* PET) in an amount sufficient to accelerate activation of the oxygen scavenger layer. In particular, Collette teaches a core oxygen scavenging layer formed from a blend that includes "on the order of 1-10% masterbatch, and 90-99% polymer, which includes at least on the order of 50% PC-PET" (see Summary at P4S4). Thus, it is respectfully submitted that amended claim 27 is in condition for allowance. Reconsideration and notice to this effect is respectfully requested.

### III. 35 U.S.C. 103

Although included in the 35 U.S.C. 102 section of the Final Office Action, the first paragraph of page 3 appears to raise an obviousness rejection. This paragraph asserts that Collette discloses all of the elements recited in claim 1 and that, with regards to clause (f) of claim 1, "Applicant admits that Collette teaches the claimed step, but disputes the claimed order." Based on this assertion, the Office Action further argues that

"[a]s this claim appears to be directed to a difference in the order of performing a process step which Applicant admits to be present in the reference, and has not argued or provided any new or unexpected result, this claim would have alternatively been *prima facie* obvious over Applicant's admission of the teaching of the step." Applicants respectfully traverse these characterizations.

Clause (f) of claim 1 does not recite a process step of activation. Instead, claim 1 recites a method for producing a container, wherein the resulting unfilled container is storage stable and includes a barrier layer having a specific *property* (i.e., an oxygen scavenging property that is activated after filling, as recited in clause(f)). As discussed above with respect to the anticipation rejections, the container resulting from the method of Collette does not include the features of clause (f). As such, it is respectfully submitted that the rejection of claim 1 should be withdrawn. Reconsideration and notice to this effect is respectfully requested.

Claims 5, 16, and 26 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Collette in view of Nilsson et al. Applicants respectfully submit that in light of amended claim 1, which is in condition for allowance, the rejection of claims 5, 16, and 26 are moot. Thus, Applicants respectfully submit that claim 5, 16, and 26 stand in condition for allowance. Reconsideration and notice to this effect is respectfully requested.

Independent claim 27 also stands rejected under 35 U.S.C. 103(a) as being unpatentable over Collette. As discussed above with respect to the 102(b) rejection of claim 27, Collette does not teach a method for producing a plastic container having a barrier layer that is formed from an admixture that consists essentially of a preblend and a virgin bottle grade base polyester. As such, Applicants respectfully submit that amended claim 27 is allowable over Collette. Reconsideration and notice to this effect is respectfully requested.

### CONCLUSION

In view of the foregoing, claims 1-3, 5-21, and 25-32 are in condition for allowance. Reconsideration and prompt allowance of all pending claims is respectfully

requested. The Commissioner is authorized to charge any additional fees associated with this paper or credit any overpayment to Deposit Account No. 50-2070.

Respectfully submitted,

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